

1 IN THE UNITED STATES DISTRICT COURT
2 IN AND FOR THE DISTRICT OF DELAWARE

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4 COOPER NOTIFICATION, INC., : CIVIL ACTION
5 Plaintiff, :
6 v. :
7 TWITTER, INC, EVERBRIDGE, INC., :
8 RAVE WIRELESS, INC., and :
9 FEDERAL SIGNAL CORP., :
Defendants. : NO. 09-865 (LPS)

10 - - -
11 Wilmington, Delaware
12 Thursday, December 15, 2011
13 Telephone Conference

14 BEFORE: HONORABLE **LEONARD P. STARK**, U.S.D.C.J.

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16 APPEARANCES:

17 POTTER, ANDERSON & CORROON, LLP
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19 and

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1 APPEARANCES: (Continued)

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P R O C E E D I N G S

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(REPORTER'S NOTE: The following telephone

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conference was held in chambers, beginning at 10:53 a.m.)

1 THE COURT: Good morning, counsel. This is
2 Judge Stark. Who is there, please?

3 MR. ROVNER: Good morning, your Honor. This is
4 Phil Rovner from Potter Anderson for the plaintiff; and with
5 me on the line is Paul Andre from Kramer Levin.

6 THE COURT: Okay.

7 MS. HATCHER: Good morning, your Honor. Laura
8 Hatcher from Richard Layton & Finger. With me on the line
9 are Ed Cavazos and Conor Civins from Bracewell & Giuliani
10 for Everbridge.

11 THE COURT: Okay. Anybody else there?

12 MR. HIGGINS: Good morning, your Honor. Jim
13 Higgins from Young Conaway on behalf of Federal Signal.
14 With me on the line is Tom Leach from Merchant & Gould.

15 THE COURT: Okay.

16 MR. MAYO: Good morning, your Honor. Andrew
17 Mayo from Ashby & Geddes for Twitter; and with me on the
18 line is Ryan Marton from Fenwick & West.

19 THE COURT: Okay. Is that everybody?

20 Okay. I take it that it is.

21 For the record, this is our case of Cooper
22 Notification Inc. versus Federal Signal Corp., our Civil
23 Action No. 09-865-LPS. We're here to address discovery
24 disputes. I have received a series of four letters. I want
25 to begin first with Federal Signal's request for sanctions

1 from Cooper relating to purported improper preparation for
2 Rule 30(b)(6) depositions. So let me hear first on this one
3 from Federal Signal, please.

4 MR. LEACH: Thank you, your Honor. This is Tom
5 Leach for Federal Signal. We moved for sanctions based on
6 improper appropriation of 30(b)(6) witnesses and some of the
7 conduct within those depositions.

8 Cooper says that we weren't prejudiced at all
9 but because of their conduct, we had to fly back out to
10 New York to take another witness on a topic for which they
11 withdrew one of their witnesses from because he was
12 completely unprepared to testify on that topic. And that
13 wasn't the only one. There was a number of other topics for
14 which their witnesses simply weren't prepared for.

15 But I guess what was more egregious is the way
16 they prepared their witnesses. These witnesses only met
17 with the attorneys, looked at a few documents that the
18 attorneys selected to show them, and the attorneys told
19 them how to testify about those documents.

20 They admit in their letter that both Mr. Hearn
21 and Mr. Milburn haven't been with the company long so they
22 didn't have much personal knowledge. Neither Mr. Milburn,
23 nor Mr. Hearn spoke with any witnesses that had firsthand
24 knowledge of the facts to which they were going to testify
25 about. Essentially, these witnesses heard the lawyers, the

1 litigation counsel's argument and parroted them back to us
2 in 30(b)(6) deposition testimony.

3 So we're seeking our fees for having to fly back
4 out to New York to take the deposition of Mr. Lowry on the
5 financial topic for which Mr. Hearn or, I am sorry, for
6 which Mr. Milburn was supposed to testify about and testify
7 that he was not prepared and for which Cooper withdrew him
8 as a 30(b)(6) witness.

9 We're also requesting the option, if we need to,
10 to take a 30(b)(6) witness on authentication and document
11 collection for which Mr. Hearn, I am sorry, Mr. Milburn was
12 also supposed to testify. He was not prepared to testify
13 on that. We had some back and forth. At first, they said
14 that he completed that topic but later they agreed that
15 Mr. Drescher would provide testimony on that topic.

16 When we flew out to California, Mr. Drescher
17 was completely unprepared. He admitted he was not prepared
18 to talk about any document collection in the case, and so we
19 seek the option to take that deposition if we needed in the
20 future as we get closer to trial.

21 The standard for preparing a 30(b)(6) deponent
22 is we are entitled to the information or knowledge of the
23 corporation, not merely what the attorney's argument is.
24 That is what we got in the case. We got the attorney's
25 argument. Both Mr. Hearn and Mr. Milburn simply listened

1 to what the attorneys had to say and that was to the extent
2 of their knowledge on almost all of the topics.

3 Now, Mr. Milburn was also supposed to cover
4 the topic of marketing. He started at Cooper in January of
5 2010. However, our category went from 2007 to the present
6 in terms of competition. And he testified that he had no
7 knowledge and did nothing to prepare for that topic on
8 competition except for what he personally knew about that
9 topic, which means he knew nothing prior to January of 2010.

10 Cooper maintained that he completed that topic
11 and we would not get another witness.

12 Expert reports were due. Those were submitted,
13 and we were prevented from taking any testimony on competition
14 before 2010.

15 Now, why is that important? We had the right
16 to examine Cooper on the topic of competition for, for
17 example, our damages expert reports when they talk about the
18 hypothetical negotiation which their own damages expert says
19 would have taken place in 2008. We simply had no witness
20 that was knowledgeable and he did nothing. He talked to no one
21 of the attorneys and did nothing specifically on competition
22 to be able to testify on that topic.

23 Despite that, Cooper maintained that he has
24 completed that topic.

25 In terms of some of the statements that Cooper

1 makes in their letter, they say we had nine hours, for
2 example, for Mr. Milburn. Those nine hours, they must be
3 counting all the breaks, which many of their breaks were
4 taken because their witness and the attorney wanted to take
5 and took long breaks during that deposition. So it wasn't
6 nine hours of straight deposition testimony. In fact, at
7 about seven hours, they cut us off despite us having more
8 questions. And,

9 The reason I raise that is this has happened to
10 us a number of times. We're all trying to work together
11 to burden Cooper as minimally as we can, so we all agreed to
12 take a witness. There is three defendants in this case, all
13 with different systems, different theories, and we've been
14 basically forced to each figure out how to divide it amongst
15 the defendants.

16 So for Mr. Milburn, we certainly didn't get
17 nine hours. They must be counting the breaks or maybe the
18 time that they were there but a lot of those breaks were
19 predicated on their witness wanting to take a break or the
20 attorney wanting to take a break.

21 I think we were entitled to get the corporation's
22 knowledge on these topics. We are entitled to get witnesses
23 that spoke with the inventors, witnesses that spoke with the
24 financial people, or people that had information, firsthand
25 information about these topics.

1 What we got was the witness saying I looked at
2 some documents that the lawyer showed me and the lawyer told
3 me how to testify about them. That is not a properly prepared
4 witness, and I question whether that is even appropriate in a
5 30(b)(6) deposition.

6 Counsel cannot filter through the evidence, set
7 aside what is bad for their case, and tell the witness only
8 what the good stuff is and let him testify to that without
9 no investigation or without any investigation or talking to
10 the people that actually know what happened. And,

11 So for that reason, we would seek our fees and
12 costs for having to fly back out to New York to retake Lowry
13 on the topic of Cooper's finances. We would also seek the
14 option to retake a witness on authentication and document
15 collection by Cooper, if we require it.

16 THE COURT: All right. Mr. Leach, although I
17 don't know if it is directly relevant to your request, there
18 is a suggestion in Cooper's letter that some of the question-
19 ing during the Milburn deposition was itself inappropriate or
20 unduly contentious. Can you speak to that?

21 MR. LEACH: Certainly. I am not sure exactly
22 whose testimony they were citing. Again, there was three
23 of us that were sharing the date. But I don't think anyone
24 from the defendants were inappropriate. We were simply
25 trying to get the facts, frustrated that the witness either

1 didn't know the facts or was simply trying to tell the
2 litigation or the outside counsel's argument of what the
3 facts were, but they had really no facts.

4 We went round and round trying to understand
5 what they knew, how they prepared, and in the end it became
6 clear. I asked them very pointed questions at the end; and
7 one I cite in my brief is where I asked especially on the
8 contentious topic of this on-sale bar, the prior public use.

9 Basically, I asked Mr. Milburn: Did they put
10 invoices, proposals in front of you, show you those documents
11 and tell you how to testify to them?

12 He unequivocally said yes.

13 So I don't think anyone at the deposition was rude
14 to Mr. Milburn or asked inappropriate questions, although we
15 were probing and trying to understand what he knew and what he
16 did to prepare. And it was clear he didn't do anything but
17 talk with the lawyers.

18 THE COURT: What is the date of the renoticed or
19 continuation of the Lowry deposition in New York, the cost
20 of which is the basis for your motion for sanctions?

21 MR. LEACH: I don't know what date that actually
22 took place. And when they say we weren't burdened, I was out
23 there for Federal Signal along with the other defendants to
24 take Milburn on the financial topic. I was unable to take --
25 well, let me back up.

1 They said when they withdrew Milburn from a
2 bunch of topics, they said we'll make it as convenient as
3 possible.

4 Their proposal was to do David Drescher on some
5 of the topics in California on one day and Milburn or, I am
6 sorry, Lowry in New York the following day. This would
7 have forced us to actually make sure different counsel did
8 it because you can't go to California, take a deposition,
9 and then get back to New York to take another deposition,
10 at least the same person can't without taking the "red eye"
11 back. And so that was their first offer to us.

12 We obviously rejected that. But in the end, I
13 had to send someone else. So someone else at our firm had
14 to re-prepare for this deposition, fly to New York and take
15 it. And,

16 I am looking at my calender now. I can't -- I
17 don't see when that was. Does anyone else --

18 THE COURT: That's okay.

19 MR. LEACH: -- in my co-defendants know when
20 that happened? I thought it was November.

21 MR. CIVINS: November 22nd, Tom.

22 MR. LEACH: 22nd. Thank you, Conor.

23 THE COURT: So the basis of my question is
24 really whether you or whoever took the deposition had reason
25 to be in New York at that time anyway? And your answer is

1 no.

2 MR. LEACH: No.

3 THE COURT: Okay.

4 MR. LEACH: I don't think any of the defendants'
5 counsel had reason to be out there on that date.

6 MR. CIVINS: Everbridge did not.

7 THE COURT: Let me hear from Cooper, please.

8 MR. ANDRE: Your Honor, this is Paul Andre for
9 Cooper.

10 Just talking about Mr. Lowry's deposition, that
11 is not even noticed. That is not even mentioned in Federal
12 Signal's letter. So, obviously, that is not something they
13 were moving on the Court today. They actually were framing
14 the issue of Mr. Milburn's deposition, whether it was a
15 waste of time or not.

16 That being said, three defendants in this
17 case each provided 30(b)(6) notices. They did not try to
18 consolidate them. There are over 100 topics. Amongst
19 those three 30(b)(6) notices, many of them overlapped but
20 nevertheless there was over 100 topics.

21 We provided responses and objections to those
22 topics. Many of them were overbroad and overly burdensome,
23 and we told them what we provided witnesses to testify to.

24 They did not have any response to our objections.
25 They accepted them and that includes those depositions to take

1 these witnesses.

2 They also noticed many 30(b)(1) witnesses, which
3 we're going to try to consolidate the 30(b)(6) deposition
4 into the 30(b)(1) just so it would be more convenient for to
5 all the parties and reduce the costs. So we took our two
6 executives that had been noticed under 30(b)(1) and gave
7 them several of the topics under 30(b)(6) for each of the
8 defendants.

9 Their action of going to New York to take
10 Mr. Milburn and Mr. Hearn, they were there anyway.

11 The other 30(b)(6) topics that they noticed,
12 we did provide witnesses to testify on during the fact
13 discovery period and those witnesses testified completely on
14 those.

15 With respect to the one example Mr. Leach
16 raises in his argument today, the issue of competition. We
17 didn't see the relevance of competition to the case, and we
18 objected on that ground. We told them we would provide
19 someone to talk about competition in more recent times and
20 did so. And at times, there were no other questions they
21 had pending about the competition, so for them to raise it
22 in a letter now I think is disingenuous.

23 More importantly, it talks about the prep of
24 the witnesses. The fact of the matter is they're asking for
25 main topics that covered back to 2002 up through 2008 and

1 Cooper simply does not have employees that have personal
2 knowledge of that information. We have former employees.

3 So as far as preparing witnesses to testify
4 about that, our current employees, we provided them with
5 dozens of documents they could read, deposition testimony of
6 the percipient witnesses, the 30(b)(1) witnesses that did
7 have personal knowledge, and they were prepared to testify
8 to the best they could be prepared.

9 Now, with Mr. Milburn, the questioning was
10 extremely contentious. I would imagine if you asked Mr.
11 Milburn, he would consider it one of the worst days of his
12 life. Counsel was on constant attack.

13 It did go over nine hours and 40 minutes, seven
14 hours of actual deposition testimony, as Mr. Leach talked
15 about. It was a very long day and a very contentious day.
16 And Mr. Milburn, at some point, just forgot two of the topics.
17 He just could not remember, and he was being confused.

18 So we de-designated him on two of the topics and
19 had those covered by two other witnesses. This is at no
20 additional cost to counsel. It was not as if they flew out
21 to take Mr. Milburn's deposition for the sole purpose of
22 doing these nine or 11 topics on which defendant. They
23 actually noticed the 30(b)(1) as well.

24 If anything, we did what we could to try to
25 consolidate and reduce costs by these defendants massive

1 30(b)(6) notice. Our preparation of witnesses were as well
2 as we could do that with all the documents and evidence that
3 was available to us at the time.

4 THE COURT: Mr. Andre, was there a topic that Mr.
5 Milburn was designated for that you ultimately de-designated
6 him and Mr. Lowry was the person who was designated eventually
7 on that topic?

8 MR. ANDRE: Yes, your Honor. It was on the
9 finances, which we don't believe was relevant.

10 They said they wanted to take finances.

11 We said we don't believe Cooper's finances are
12 relevant to this case, and we have had this issue many
13 times. And,

14 They said they want to take a witness on that
15 topic.

16 We said, well, we have one person, our
17 controller, that can testify on the spreadsheets. And,

18 What we did, we took the QuickBooks, and I
19 believe that is an issue that was raised in the other
20 letter, and we ran spreadsheets for them, detailed it all
21 ourselves.

22 The person that actually did that was Mr. Lowry.
23 We told them that would be the person that could testify to
24 it, if they wanted to do it. We don't think it is relevant
25 whatsoever.

1 Two of the defendants choose to go. I believe
2 Twitter even chose not to show up at that because they don't
3 believe it is relevant either, obviously. So they close to
4 take Lowry.

5 We made him available out of pure cooperation
6 instead of objecting and having to come to your Honor for a
7 motion to compel.

8 THE COURT: Is this Topic 28 on finance,
9 Mr. Andre?

10 MR. ANDRE: That's correct.

11 THE COURT: So isn't it the case then that
12 whether relevant or not, there is no protective order in
13 place? You chose to designate Mr. Milburn. He wasn't
14 prepared at the time of the deposition that counsel were
15 at to depose him on Topic 28, and then you redesignated
16 Mr. Lowry on Topic 28 and that necessitated counsel for
17 defendants to be in New York for the sole purpose of taking
18 Mr. Lowry's deposition on Topic No. 28.

19 Is that all correct?

20 MR. ANDRE: I wouldn't characterize it that way,
21 your Honor. I would say that the fact of the matter is we
22 are trying to consolidate as much as we could, but Mr.
23 Lowry -- if we are ever going to provide a detailed analysis
24 of Topic 28, which counsel required, it would be Mr. Lowry.

25 If they wanted to authenticate the documents,

1 those are the spreadsheets, Mr. Milburn could do so. But
2 that was all he was willing to do, that is all he is going
3 to do.

4 They wanted to dig into the details of how those
5 documents, those numbers were created. That is going to be
6 another witness.

7 THE COURT: And on the authentication topic and
8 document collection, are you able to say at this point
9 whether there will be any challenges to the authenticity of
10 documents that you have produced? Challenges from you?

11 MR. ANDRE: No, your Honor. There will be no
12 challenges on authentication of documents.

13 THE COURT: Okay.

14 MR. ANDRE: Mr. Milburn was the one who
15 authenticated those were the financial documents. They say
16 what they say. They are just spreadsheets.

17 But they want to know how the documents are
18 generated, and that is going to be another witness.

19 THE COURT: All right. Let me turn it back to
20 Mr. Leach. Is there anything you wish to add?

21 MR. LEACH: I do. I would like to address
22 almost everything he said. Let's start with the finances.

23 The topic is the unit sales, customer revenue,
24 cost of goods sold, profit, expenses for each of Cooper's
25 products, if any, that allegedly practice or embody the

1 claimed invention.

2 This topic is directly relevant to the
3 Georgia-Pacific factors of the hypothetical negotiation.
4 We were not solely seeking to authenticate documents. We
5 wanted to understand what documents they had. We wanted to
6 understand what these spreadsheets meant. There are sales
7 numbers in these documents that we needed to understand and
8 someone was supposed to testify to that.

9 For him to say it wasn't relevant is simply not
10 the case. Those documents are absolutely relevant or this
11 topic is absolutely relevant, and it necessitated us to go
12 to New York and get this information.

13 His point about there being 100 topics. Many,
14 if not -- maybe there is three that don't overlap. All of
15 these topics pretty much overlap. The defendants tried to
16 consolidate and almost copy verbatim the topics and so there
17 weren't 100 topics that they had to deal with.

18 I think, your Honor, you correctly said that
19 they had a duty to move for a protective order. They never
20 did that. And,

21 Then on this point there is no one at Cooper
22 that has personal knowledge of these facts? He is just
23 wrong about that. Unless there has been a few witnesses
24 that have since left, I don't know but I think at the time
25 they were there.

1 I think Mr. Brabec works for Cooper. He was one
2 of the inventors and one of the founders of Roam Secure, the
3 company way back when that dealt with a lot of this, a lot
4 these issues back then. And,

5 The same with Dan Park. He was also back then.
6 He still works at Cooper and he was one of the inventors
7 and founders of Roam Secure, the company that allegedly
8 developed the inventive technology. And,

9 Also, they represent the other inventors and
10 founders of the company that are even third-party witnesses.
11 They certainly had access to these people. They certainly
12 could have had Milburn or Hearn talk to them. So I'll leave
13 it at that.

14 THE COURT: All right. Well, I am going to grant
15 the request for sanctions in connection with the deposition
16 which I am told was on November 22nd of Mr. Lowry.

17 Topic 28 sounds as if it is a relevant topic
18 but, more importantly, there was no protective order in
19 place to make it improper to question a 30(b)(6) witness on
20 Topic 28. And,

21 In fact, Mr. Milburn was designated by Cooper to
22 testify as their 30(b)(6) witness on Topic 28. He was not
23 prepared to do so. He was de-designated, and then Mr. Lowry
24 was designated on that topic. That necessitated defense
25 counsel to be in New York to depose Mr. Lowry on Topic 28

1 when they had no other reason to be in New York. So I do
2 believe that sanctions are appropriate.

3 Now, mind you, I am not at this point ruling that
4 all defense counsel for all defendants will be reimbursed 100
5 percent of all of their costs associated with the November
6 22nd deposition. I will make a specific determination as to
7 precisely how sanctionable this conduct is after I receive
8 further documentation. And,

9 I will and do hereby direct the parties to meet
10 and confer and to propose to the Court by Monday a schedule
11 by which defense counsel will disclose precisely what it
12 is they are seeking in terms of a monetary sanction and to
13 provide a brief written argument in support of it and to
14 allow Cooper an opportunity to respond and defendants to
15 briefly reply to that. After I have that full record, I'll
16 make a specific determination as to the amount of sanctions.

17 With respect to the option to take an additional
18 30(b)(6) deposition on authentication and document collection
19 issues, the request is granted to that as well. The defendants
20 have that option and may take an additional 30(b)(6)
21 deposition on those topics.

22 Let's move then quickly on to the other two
23 letters. Here, it is disputes raised by Everbridge against
24 Cooper. So let me hear first briefly from Everbridge.

25 MR. COVAZOS: Good morning, your Honor. This is

1 Ed Cavazos for Everbridge. I am going to address the first
2 issue raised in our letter. Then any colleague, Conor
3 Civins will address the remainder.

4 I will do this very quickly because I know there
5 are several issues in our letter.

6 This first issue we think is a relatively
7 straightforward one, involves an e-mail that was produced
8 during the normal course of discovery by Cooper. As your
9 Honor may see when you review the e-mail, the e-mail
10 makes it pretty apparent that Cooper personnel had some
11 communications with ex-Everbridge employees in which we
12 believe those Everbridge employees disclosed certain trade
13 secrets to Cooper.

14 Our request is very simple, your Honor. That
15 is not as Cooper has argued it is, a de-designation, because
16 we believe these are trade secrets and we don't want this
17 document de-designated and losing protection under the
18 protective order but rather a very limited opportunity to
19 share with our client the first two pages of that document,
20 the ones that we attached to our letter brief, so that our
21 client understands the extent to which their trade secrets
22 may have been compromised, our client may take steps to
23 potentially mitigate further compromise of his trade secrets,
24 to perhaps identify which of its ex-employees are engaging
25 in the dissemination of their trade secrets.

1 We thought it was a pretty straightforward
2 request, your Honor. If you look at the face of this letter,
3 we don't see anything in this letter other than facts and the
4 information regarded to our client and us. We saw no basis
5 for any reason that Cooper would object to us showing this
6 letter for our clients so they could determine how best to
7 respond to it.

8 You will see in the correspondence leading up
9 to this, we even offered that Cooper, if there was something
10 they thought was somehow confidential to their client embodied
11 in this letter that we would be willing to consider what
12 that was, whether it needed to be redacted. We didn't get
13 any such specificity from them. Quite honestly, your Honor,
14 we're a little puzzled by our inability to show our client
15 this letter which purports to contain their trade secrets.

16 THE COURT: Are you willing to represent as to
17 what you would or would not put this to or that your client
18 would?

19 MR. COVAZOS: I don't think I am in a position
20 to represent that because I haven't been able to discuss the
21 specific contents of the letter with my client. I mean I
22 think it would be inappropriate for me to limit my client's
23 reaction to this before they understand the severity to
24 which the dissemination of these trade secrets may have hurt
25 them.

1 THE COURT: Let me hear Cooper's response,
2 please.

3 MR. ANDRE: Your Honor, this is an e-mail,
4 internal e-mail of Cooper's businesspeople talking about
5 competitive analysis. Two of Everbridge's former employees
6 were talking out of school, and they were recording what they
7 were saying. The fact of the matter is that information also
8 talks about how they can also position themselves in the
9 market to make their business more competitive.

10 The reason we have a major problem with this is
11 because this e-mail is not relevant to anything in this case
12 and showing it to the executives, which they hinted they're
13 going to be filing a lawsuit against Cooper for somehow
14 misappropriation of their trade secrets, not because of
15 anything Cooper did, just because they actually overheard
16 their ex-employees talking.

17 Nonetheless, there is no basis for showing this
18 to management. There is no need for it. It is not relevant
19 to anything in this case. It is after close of fact discovery,
20 and the only reason they are doing it for is for improper
21 purposes.

22 THE COURT: What about the idea of redacting the
23 stuff that you say is competitive information of your own?
24 Of Cooper's?

25 MR. ANDRE: The essence of the entire e-mail is

1 Cooper's internal process on how they're thinking about
2 competition. It would be such a massive redaction that
3 there is no basis. I mean I wouldn't know what we could
4 make available, publicly available other than the fact that
5 two of their employees are talking. And I think management
6 already knows that because they reported on that. So I
7 don't know how to go at that.

8 We looked at the e-mail itself. We have looked
9 at the fact that it is just an interim e-mail. All companies
10 do competitive analysis on each other. And just because it
11 has information about Everbridge doesn't make it any less
12 confidential to Cooper.

13 THE COURT: All right. Mr. --

14 MR. COVAZOS: Your Honor, if I may quickly
15 respond.

16 THE COURT: Yes, go ahead.

17 MR. COVAZOS: This is a one page letter, if your
18 Honor doesn't have it in front of you. This is not an
19 onerous and technical document that would have to be parsed
20 through.

21 I would represent to the Court that we don't
22 believe in good faith anything on this one page reflects any
23 Cooper anything. It is all how much revenue the ex-employees
24 say we have, what type of customers we go after, et cetera.
25 It doesn't say here is how that compares to Cooper's

1 strategies or anything of the sort.

2 Your Honor, the bottom line is that unlike what
3 Mr. Andre tries to say this is, which is a report about
4 overhearing, it very clearly is directly competitive
5 proprietary type information and to the extent there is
6 anything about Cooper in here, there is the last part, the
7 very short last sentence of the letter where they basically
8 say let's go -- let's take this information and go out and
9 target Everbridge's customers with this.

10 This isn't proprietary or secret information
11 to them. It is not competitive information of them. It is
12 very clearly Everbridge trade secret information. And by
13 the way, as we all know, it is not a defense to say I just
14 listened to people talk about trade secrets and then was
15 free to use them. This is something my client has a right
16 to see.

17 In essence, your Honor, if we're not able to
18 show this to our client, Cooper has effectively laundered
19 this document by producing in this case, marking it as
20 attorneys' eyes only, and now I am not able to advise my
21 client on what, if anything, they might need to do or how
22 they may have been harmed by what went on here.

23 Final thought, your Honor. It very clearly was
24 raised in a timely way. Our protective order speaks to when
25 you are supposed to raise it. It says during the

1 litigation. It doesn't say anything about whether or not it
2 is during fact discovery. And, in fact, our first request
3 was during the fact discovery. I think that is a red
4 herring.

5 We think this is straightforward, your Honor. Our
6 client deserves to see what its ex-employees is conveying to
7 its competitors in the market. This is an improper attempt to
8 use a designation of a document to keep our client from doing
9 that.

10 THE COURT: All right. On this request; and for
11 the record, I have reviewed two page e-mail, it is Exhibit A
12 to DI 342; I am granting Everbridge's request for the limited
13 de-designation solely for the purpose of sharing this two page
14 e-mail with its management.

15 Having reviewed it, it does consist of information
16 that is information of Everbridge and not of Cooper. To the
17 extent Cooper thought that it may have added some of its own
18 competitive information to it, it had the opportunity to
19 redact that, did not believe it was appropriate or could be
20 done.

21 I understand that argument, but on the whole, I
22 think the information is overwhelmingly, if not exclusively,
23 Everbridge's; and I will permit them, and hereby do permit
24 them, to share it with management as they request.

25 That doesn't, by any means, indicate that

1 anybody, including Cooper, is in violation or has some
2 liability for trade secrets or anything. This is simply a
3 decision that Everbridge is entitled to see this document.

4 There are some remaining disputes. We only have
5 a couple minutes. I'll turn it over to, I think it was Mr.
6 Civins. If you would, start first with the argument that
7 the Court has already ruled on all of these requests and
8 denied them previously.

9 MR. CIVINS: Certainly, your Honor.

10 So all of the requests -- I'll start quickly
11 with the documents relating to the acquisition of Roam
12 Secure by Cooper.

13 Your Honor, we have been asking for these
14 documents for months. We had a hearing on documents like
15 this. The defendants were certain that there were documents
16 that hadn't been produced based on the limited production we
17 had gotten; and Mr. Andre made broad blanket statements that
18 all nonprivileged documents have been produced.

19 Frankly, your Honor, these statements have been
20 made throughout the litigation and these hearings and have
21 been proven time and time again not to be accurate.

22 We have testimony from David Drescher who was a
23 30(b)(6) witness specifically identifying documents, and
24 internal presentation prepared by Ken DeMarco, a pitch deck
25 that was meant for Cooper, prepared by Roam Secure.

1 Potentially, and I will acknowledge that this
2 one only potentially exists, David Drescher said he did an
3 analysis on his computer that did exist, and then he left
4 his computer with Cooper working lab and there was a due
5 diligence checklist that included a package of Roam Secure
6 documents, contracts, sale forecasts, financial statements,
7 and product over views.

8 This came up during the deposition. I addressed
9 it with Mr. Andre on the record; and, you know, he vaguely
10 responded, well, we produced all non-privileged documents.

11 I said look. And,

12 He said I don't know if these documents exist or
13 not.

14 The witness was clearly testifying not that he
15 thought these documents existed but that they did exist and
16 he recalled them. And,

17 I said, well, we need these documents. And,

18 Mr. Andre wasn't able to tell me whether they've
19 privileged or had been withheld or whether they were
20 withholding them. Either they hadn't looked for them or
21 they were not clear on what their position was.

22 Again, your Honor, these documents are highly
23 relevant to our damages case and they should have been
24 produced. All that was produced was the stock purchase
25 agreement and the attachment.

1 There is underlying analysis and preparation and
2 due diligence that went back and forth. It could not have
3 been privileged between Cooper and Roam Secure, and none of
4 those have been produced. And from Dave Drescher, we got
5 specific testimony about what those documents were.

6 THE COURT: All right. Let me stop you there,
7 Mr. Civins.

8 Mr. Andre, you have represented as recently
9 as your letter that you have produced all responsive
10 nonprivileged documents. How can that be in light of what
11 Mr. Drescher testified?

12 MR. ANDRE: Your Honor, Mr. Drescher was
13 testifying about the acquisition at the time period well
14 before the patent issued. So the documents after the
15 patent issued or after we began this lawsuit or even in
16 this lawsuit, we produced all documents that we were able to
17 locate. We did diligent searches throughout the entire
18 company, including the legal department, to find all
19 documents relating to the acquisition.

20 THE COURT: So you have not produced documents if
21 they were responsive but prepared prior to your contemplation
22 of the lawsuit?

23 MR. ANDRE: No. No, your Honor. We produced
24 all documents. My point about that is Mr. Drescher is
25 talking about there are certain documents that existed

1 before the patent issued, during the acquisition. Whether
2 they did or did not, I don't know. As I told counsel, all
3 I know now, if they existed at the time of the lawsuit, we
4 produced them. Every document we had in our possession. And,

5 I think Mr. Civins is incorrect. The documents
6 he testified to, we did produce in this case that Mr. Drescher
7 talked about. He talks about a slide deck. He didn't know
8 if it is available or not, exists or not. He talks about a
9 due diligence checklist. There is no due diligence
10 checklist. We looked everywhere.

11 THE COURT: Okay. Sorry to interrupt you. I am
12 just running out of time. But you continue to maintain you
13 produced all of the nonprivileged responsive documents and
14 you have diligently searched; correct?

15 MR. ANDRE: That's correct, your Honor.

16 THE COURT: All right. Mr. Civins, I understand
17 your skepticism but I don't know what I can do for you if
18 they say they searched and can't find them.

19 MR. CIVINS: Certainly, your Honor. I know you
20 are running out of time so I will move on.

21 I will say that you said you understand our
22 skepticism. This is an increasing problem in this litigation
23 and so we continue to come to these hearings and we get this
24 sort of representation and then we get testimony these
25 documents exist.

1 Let me move on. I am going to move on to the last document
2 that we talked about here. I am sorry. Let me move on to --
3 let's see here -- Point No. 5.

4 So there were financial documents that during
5 the deposition of Mr. Lowry, there was a spreadsheet that we
6 have attached to our letter as an exhibit, and he testified
7 about two main things. One is that he had reviewed Roam
8 Secure financial statements in order to prepare the summary
9 that was on the first page of that document.

10 I went around and around with him asking him
11 to identify those documents. After we got long speaking
12 objections from opposing counsel, he clammed up and said he
13 couldn't remember but he did know he reviewed documents a
14 few months before to prepare that summary. And I said,
15 well, we want those documents.

16 Those documents clearly exist because he used
17 them to prepare the spreadsheet, and all I want is the Roam
18 Secure financial documents he relied on to prepare the
19 summary, which is Bates number -- I'll get it for you here
20 in a second. It is Bates number CNI018797.

21 Again, there is clear testimony under oath that
22 he reviewed Roam Secure financial documents to prepare that
23 document, and we don't have them.

24 The other issue that I wanted to raise that Mr.
25 Lowry testified about was the QuickBooks, the spreadsheet

1 that starts on CNI018798.

2 Now, I won't burden your Honor with the long
3 history of the on-sale bar issue, but this has become an
4 incredibly hotly contested issue in this case. The more
5 we dig and the more documents that are produced, the more
6 evidence comes to light that this product was on sale before
7 the critical date.

8 We have an ECMA invoice dated March 15th. We
9 have an e-mail suggesting that on March 15th. We have
10 strange testimony from Mr. Tiene suggesting he backdated
11 that invoice.

12 Then, if you recall, your Honor, we asked you to
13 compel the metadata. They produced the metadata. We were
14 frankly thrilled with that production because it clearly
15 indicates that that document was in fact produced on
16 March 15th.

17 We have handwritten notes suggesting, you know,
18 over and over and over again.

19 Now, the RSAN spreadsheet that Mr. Lowry
20 testified about was run from QuickBooks and goes back from
21 2000 to present, and some of it is SAP information but the
22 information we are interested in is from QuickBooks and it
23 is an order intake report, which I have never seen that
24 report produced. And I am sure your Honor is familiar with
25 it.

1 QuickBooks had a myriad of information that
2 Cooper is sitting on that they have chosen not to produce.
3 They have cherry-picked the exact report they wanted to
4 produce which is an order intake report. It doesn't
5 address -- and their letter is inaccurate. It doesn't
6 address financial revenue, it doesn't address sales, it
7 doesn't address accounts receivable.

8 There is a QuickBooks report and information
9 that goes back to 2000 that shows more information about
10 RSAN sales that they have produced. What I would ask, your
11 Honor, they're obligated to run the various reports that
12 are available relating to that RSAN information, and that is
13 what we want. Because I strongly suspect that when you run
14 other reports, other dates are going to appear that support
15 our case, that support our theory that this product was on
16 sale in March. And,

17 To be clear about it, your Honor, the order
18 intake report, Mr. Lowry couldn't testify specifically about
19 what that even was, but the order intake report has to do
20 with when an order was received, and it is not clear at all
21 what it is that means an order was received. Sometimes it
22 means a purchase order is actually sent from -- a purchase
23 request is sent from the client or whatever. But accounts
24 receivable stuff is sometimes lodged before that. Revenue
25 information is logged before that.

1 There is information Cooper is sitting on in
2 that QuickBooks system that we are entitled to relating to
3 RSAN sales, and that is one of the things that we're
4 seeking.

5 THE COURT: All right. I have to cut you off
6 there. Let me give Mr. Andre a couple minutes to respond,
7 if he wishes.

8 MR. ANDRE: Your Honor, I don't know where to
9 go with that, to be quite frank. We produce all our sales
10 documents. We haven't held anything back. They say we're
11 sitting on things. For example, we produced a March 15th
12 invoice. If we were going to hold anything back, that would
13 be one we would hold back. Obviously, it was postdated or
14 backdated.

15 As far as Mr. Lowry's testimony, it is something
16 that they took a full day deposition in New York as well as
17 the scope of the 30(b)(6) topics, obviously, but nonetheless
18 he did talk about how the reports were generated. He gave
19 summaries that your Honor already ruled on those were
20 sufficient.

21 They seem to be looking for the needle in the
22 haystack. We've run many different summaries using the
23 Quickbooks analysis or the type of analysis that Mr. Lowry
24 runs. He provides all the information we think we needed to
25 provide. Your Honor already ruled we have provided. So I

1 am not sure exactly what they're looking for. They
2 keep thinking there is buried information. There just is
3 nothing else out there.

4 I don't know how to run the different reports
5 they're talking about because we have run every report we
6 can think of.

7 MR. CIVINS: Your Honor, may I briefly respond?

8 THE COURT: Mr. Andre, if they tell you what
9 additional reports they want you to run, what would the
10 reason not to run them?

11 MR. ANDRE: Your Honor, we have; no problem
12 running additional reports. It is just they keep making up,
13 you know, every time we run one report, they want another
14 one run until we produce another.

15 We produced several reports here. It gets to
16 the point where it is getting to be burdensome. We will
17 run additional reports if they are very specific as to what
18 they're looking for and if we have that capability. Because
19 some of the things they're asking for, we don't have that
20 capability to do so. If we have the capability, we'll do
21 so. We told them that on multiple occasions.

22 THE COURT: Mr. Andre, I didn't give Mr. Civins a
23 chance to respond to that, but I am inclined to let them do
24 forensic metadata as it appears the metadata seems consistent
25 with what they thought it would show, but tell me what your

1 reason is for why they should not be permitted to do forensic
2 analysis?

3 MR. ANDRE: Your Honor, the metadata that was
4 produced and that is available to them, we produced six
5 pages of metadata to them. It either shows or doesn't show
6 what they think it does. And why they want to get forensic
7 analysis of it is beyond me other than the fact they are
8 trying to make something fit that doesn't fit.

9 I don't believe the metadata shows what they
10 think it shows. In fact, it shows just the opposite. It
11 shows that the document had nine versions of it, and the
12 last version, which is the document that was produced as it
13 was backdated was actually dated exactly as Mr. Tiene says
14 it was.

15 So they're trying to monkey around with metadata
16 and say what it doesn't say and there is no basis for doing
17 so. They have the actual metadata itself. It says what it
18 says, and there is no basis for doing any type of forensic
19 analysis on that.

20 THE COURT: Mr. Civins, real quick. Is there
21 anything you want to add?

22 MR. CIVINS: Your Honor, absolutely. We're not
23 going to monkey around with metadata. What they produced is
24 not metadata. They are screen shots of metadata. Metadata
25 by definition is native information, and that is what they

1 were ordered to produce and they did not do it.

2 Herein lies the problem, your Honor. You know,
3 Mr. Andre has concocted an argument suggesting there are
4 nine different versions, and we got again stretched
5 testimony from Mr. Drescher suggesting that, well, this
6 looks -- I mean, again, the testimony on this particular
7 issue has just gone on and on and on and shifts constantly,
8 and he testified under oath that, well, it looks corrupt to
9 him. I mean with no basis whatsoever.

10 So, one, they didn't produce the metadata, they
11 produced screen shots. Two, at the very least, given what
12 they're going to argue, I think we're entitled to hire a
13 forensic expert to go in and look at the stuff. As an
14 Officer of the Court, we're not going to "monkey" with
15 anything to make it say something it doesn't want to say --
16 that it doesn't say. We simply want a chance to examine
17 its meaning.

18 THE COURT: All right. I need to cut you off
19 there.

20 On these what I consider to be three requests, I
21 am granting all three of them.

22 First, on the metadata, I do think that given
23 the importance of the issue relating to on-sale bar, and
24 given that the screen shots produced so far at least super-
25 ficially appear to support the defense that we ought to get

1 to the bottom of this, and if defense wants to incur the
2 expense of undertaking a forensic analysis of the actual
3 metadata, provided that they take all necessary steps to
4 make sure that they don't do anything to transform the
5 metadata, and I am confident the parties can work out a
6 mechanism for ensuring that that does not occur; again, if
7 the defense wants to take on that analysis, they may do so.

8 The spreadsheets, Mr. Andre has agreed that
9 within reason Cooper will agree to run some additional
10 reports from QuickBooks, so defendants are to identify for
11 Cooper what additional reports they want and you should do
12 so in a very timely manner. And,

13 Finally, the documents that the witness, I
14 believe it was Mr. Lowry, testified he relied on to prepare
15 the summary, I am persuaded that those ought to be produced
16 at this point to defendants as well.

17 I'm sorry. That is all the time I have for you
18 today. The transcript will serve as my order and my rulings,
19 and thank you all for your time. Good-bye.

20 (Telephone conference ends at 11:40 a.m.)

21

22 I hereby certify the foregoing is a true and accurate
23 transcript from my stenographic notes in the proceeding.

24 /s/ Brian P. Gaffigan
25 Official Court Reporter
U.S. District Court